

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 25, 2006

MICHAEL W. COOPER v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 2000-B-655 Cheryl Blackburn, Judge**

No. M2005-01882-CCA-R3-PC - Filed August 15, 2006

Petitioner, Michael W. Cooper, appeals the dismissal of his petition for post-conviction relief. In his appeal, Petitioner argues that his trial counsel rendered ineffective assistance of counsel in connection with the negotiation and entry of Petitioner's plea of guilty to the charges of aggravated burglary and aggravated assault. As a result of trial counsel's ineffective assistance, Petitioner contends that his plea of guilty was not voluntarily and knowingly entered into. After a thorough review of the record, we conclude that Petitioner has failed to show that his trial counsel's representation was deficient, that he was prejudiced by his trial counsel's performance, or that as a result of counsel's conduct, Petitioner's plea of guilty was not voluntarily or knowingly made. We accordingly affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ. joined.

Nathan Moore, Nashville, Tennessee, for the appellant, Michael W. Cooper.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Petitioner was indicted on one count of aggravated burglary, one count of aggravated assault, and one count of especially aggravated burglary. Petitioner entered a plea of guilty to the charges of aggravated burglary and aggravated assault, and the charge of especially aggravated burglary was dismissed by the State. The plea agreement provided that Petitioner would be sentenced as a Range II offender, but the length and manner of service of his sentences were left to the trial court's

determination. After a sentencing hearing, the trial court sentenced Petitioner to nine years' confinement on each charge, and ordered the sentences to be served consecutively. The length and manner of service of Petitioner's sentences were upheld on appeal. *State v. Michael W. Cooper*, No. M2001-00440-CCA-R3-CD, 2002 WL 360222 (Tenn. Crim. App., at Nashville, Mar. 6, 2002), *perm. to appeal denied* (Tenn. Oct. 14, 2002).

The factual basis in support of the charged offenses which was presented by the State at Petitioner's guilty plea submission hearing was summarized by this Court in Petitioner's direct appeal as follows:

The facts adduced at the sentencing hearing established that the Defendant arrived at the victims' home at approximately eleven o'clock p.m. in a car driven by Michael E. Garrett. Garrett had told the Defendant that the victims had drugs. The Defendant went to the door of the residence wearing a mask and carrying a gun. Hearing a noise at the door, Christy Keith sent Jeffrey Keith to investigate. Jeffrey opened the door and beheld the Defendant standing there. The Defendant stated, "I'm coming in," and a struggle ensued, during which the Defendant's gun fired. The noise awoke Christy's eight-year-old daughter, who was also in the residence. The Defendant put his gun in Jeffrey's stomach and threatened to shoot him. Eventually Jeffrey subdued the Defendant and the Defendant stated that, if let go, he would leave. Jeffrey released the Defendant and he left, returning to the car in which he arrived. A high speed chase by the police ensued, with the Defendant and Garrett eventually being apprehended. Both victims testified that they had never before seen the Defendant, and Christy further testified that they had never sold drugs.

The Defendant testified that he had "always been a pot smoker" and that, several months before this incident, began using cocaine. Due to his cocaine usage, he owed some people some money, and feared for his life as a result. He stated that he went to the victims' residence intending to recover drugs and/or money.

Id., 2002 WL 360222, at *1.

At the guilty plea submission hearing, Petitioner informed the court that he was a high school graduate, and that he had read and understood the plea agreement. Petitioner stated that he had discussed the facts of the case with his counsel, including any defenses he might have, and he was satisfied with the assistance provided by his counsel. Petitioner affirmed that he understood his plea agreement did not have a recommendation as to the length and manner of service of his sentence. Petitioner's counsel submitted the following questions:

[COUNSEL]: Yes. I have one question of my client. This deal we have made today and all the events, have you met in my office on multiple occasions, and you went through all that with me?

[PETITIONER]: Yes.

[COUNSEL]: Do you feel like you've had sufficient time to review the case and discuss it all?

[PETITIONER]: Yes.

[THE COURT]: Okay, so you feel very comfortable in making this arrangement, [Defendant]?

[PETITIONER]: Yes, ma'am.

II. Post-Conviction Hearing

Petitioner's counsel testified that he and Petitioner had numerous discussions about the facts of Petitioner's case, and the various consequences of either entering a plea of guilty or proceeding to trial. Counsel stated that he told Petitioner that, in his opinion, Petitioner would be well-advised to accept the State's offer of a plea agreement, but, ultimately, the decision was Petitioner's to make. Counsel said he discussed the issue of sentencing with Petitioner in detail because the plea agreement left the determination of the length and manner of service of Petitioner's sentences to the trial court. Counsel recollected numerous discussions with the prosecutor before a plea agreement was reached. Counsel denied that he told Petitioner the amount of fee he would receive as Petitioner's appointed counsel. Counsel said that he told Petitioner that there was a possibility that his sentence might be longer if he proceeded to trial.

On cross-examination, counsel said that he recollected that Petitioner had an unrelated drug indictment issued against him at the time he was negotiating a plea agreement on the current charges. Counsel said that the State, by letter dated August 7, 2000, initially offered to settle the drug charge as well as the burglary and assault charges if Petitioner entered a plea of guilty in exchange for an effective sentence of sixteen years. Ultimately, Petitioner entered a plea of guilty to the current charges only. It was counsel's recollection that as to the unrelated drug charge, the State either entered a nolle prosequi as to the drug case or Petitioner pled guilty to a lesser included misdemeanor offense.

Counsel said that Petitioner's classification for sentencing purposes as a Range II, multiple offender, rather than as a Range III, persistent offender, was a part of his negotiations with the State. The discussions centered on counsel's contention that some of Petitioner's prior convictions should be counted as one conviction for classification purposes, and the State ultimately agreed to Petitioner's range classification as a multiple offender.

Petitioner testified that he met four times with counsel before the guilty plea submission hearing. Petitioner contended, however, that counsel never discussed the facts of the case, and their conversations centered more on personal matters than legal. Petitioner acknowledged that he was

aware of the State's initial offer involving an effective sentence of sixteen years, but he stated that he never saw the letter embodying the State's offer of settlement, nor was he told that the offer included the disposition of the outstanding drug charge as well as the current charges.

Petitioner said that he did not discuss the terms of the initial plea agreement offer with counsel until shortly before the guilty plea submission hearing. Petitioner acknowledged that counsel told him that he "couldn't get better than that." Petitioner stated that the agreement was never clearly explained to him. Petitioner said that he would have accepted the State's initial offer if he had known it included the disposition of the drug charge, but he believed that the State was asking him to accept a sentence of sixteen years on just the aggravated burglary and aggravated assault charges. Petitioner stated that if he had known the drug charge was included, he "could have worked with the Courts."

Petitioner stated that his counsel told him that he could not "get much worse" than sixteen years on the current charges. Petitioner said he thought, "You know, well, if I can't get much worse, then let's plea to it and let the Judge sentence me, you know." Petitioner acknowledged that his counsel made no guarantees as to the ultimate sentence Petitioner would receive, but Petitioner said he trusted counsel's advice.

Petitioner said that he and counsel only discussed the State's evidence at one of their four meetings. Counsel had a copy of the 911 tape made after the offenses were committed, but he could not play the tape for Petitioner because counsel did not have a tape recorder in his office.

On cross-examination, Petitioner acknowledged that he was familiar with the criminal justice system and the guilty plea submission process. Petitioner said that he usually just accepted whatever offer of settlement the State extended on his prior convictions because of his "illiteracy of the law." Petitioner said that he knew that he had a right to proceed to trial. Petitioner said, however, that his counsel was "looking for a plea bargain during the whole thing." Petitioner said that counsel did not investigate the facts supporting the charges against him. Petitioner acknowledged that he was guilty of the charged offenses.

At the conclusion of the post-conviction hearing, the post-conviction court found that "petitioner ha[d] failed to demonstrate by clear and convincing evidence that trial counsel was ineffective in communicating with Petitioner or that he was prejudiced by counsel's alleged deficient performance."

III. Post-Conviction Claims

Petitioner alleges that his counsel's assistance was ineffective during the negotiation and entry of his plea of guilty to the charges of aggravated assault and aggravated burglary. Specifically, Petitioner contends that counsel failed to adequately consult with Petitioner and advise him of the consequences of his plea; that counsel failed to adequately investigate the facts of the cases; and that counsel induced Petitioner to enter a plea of guilty.

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-210(f). However, the trial court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. *Id.*; *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove that counsel performed deficiently and that but for counsel's errors, the petitioner would not have pled guilty and would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Hicks v. State*, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

Petitioner argues that his counsel did not meaningfully discuss with him the ramifications of his options or adequately explain the State's initial offer of settlement which included a recommended sentence of sixteen years, and the disposition of the unrelated drug charge. Petitioner testified that his complaint was "not necessarily with the length of his sentences," but he said that if he had seen the letter from the district attorney's office outlining the State's initial offer of settlement, "it would have been – possibly I could have pled to something and worked something there."

Counsel testified that he and Petitioner met multiple times concerning Petitioner's options, and that he discussed the issue of sentencing with Petitioner in detail. Based on its review of the record of Petitioner's guilty plea submission hearing and the sentencing hearing, the post-conviction court found that "other than making generalities that counsel was ineffective and that his sentence was improper, Petitioner did not demonstrate by clear and convincing evidence that his counsel was deficient or that he was prejudiced by any alleged deficiencies" on counsel's part during the negotiation and entry of Petitioner's plea of guilty. The evidence does not preponderate against the post-conviction court's findings. Petitioner is not entitled to relief on this issue.

Petitioner contends that his counsel's assistance was ineffective because he failed to investigate any of the facts behind the charged offenses before entering into plea negotiations. Petitioner acknowledged at the post-conviction hearing that he was guilty of the charged offenses of aggravated burglary and aggravated assault, and he was aware of the facts relied upon by the State to support the charges. Petitioner did not suggest any defenses that might have been available, or what further investigation by his counsel would have revealed.

The post-conviction court noted that the record contained multiple motions filed by counsel on Petitioner's behalf, including motions for discovery, bond reduction, and other pre-trial motions. Based upon our review of the record in this matter, we conclude that the evidence does not preponderate against the post-conviction court's finding that counsel adequately investigated Petitioner's case prior to the entry of Petitioner's plea of guilty.

The post-conviction court found that Petitioner's plea of guilty was knowingly and voluntarily entered into. Petitioner acknowledged at the post-conviction hearing that he testified at the sentencing hearing that he entered a plea of guilty because he knew he was guilty, and he wanted to spare the victims from having to go through a trial. Petitioner acknowledged that he was familiar with the plea negotiation process as a result of his prior convictions.

When an accused enters a plea of guilty or a plea of *nolo contendere*, constitutional considerations mandate that the plea be voluntarily, understandingly and knowingly entered. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1713, 23 L. Ed. 2d 274, 279 (1969); *State v. Neal*, 810 S.W.2d 131, 134-35 (Tenn. 1991), *overruled on other grounds by Blankenship v. State*, 858 S.W.2d 897, 902 (Tenn. 1993). By entering a plea, the defendant waives certain constitutional rights including the privilege against self-incrimination, the right to a trial by jury, and the right to confront witnesses. *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1714. The defendant's waiver of these constitutional rights may not be presumed from a silent record. *Id.*

A plea cannot be voluntary if the accused is "incompetent or otherwise not in control of his mental facilities" at the time the plea is entered. *Blankenship v. State*, 858 S.W.2d 897, 904-05 (Tenn. 1993)(quoting *Brown v. Perini*, 718 F. 2d 784, 788 (6th Cir. 1983)). The trial court must ascertain if the defendant fully understands the significant consequences of his or her plea. *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1977). The trial court may consider a number of factors including the defendant's relative intelligence, his familiarity with criminal proceedings, whether

he was represented by competent counsel and had the opportunity to confer with counsel about his options, the advice given by counsel and the trial court about the charges against him and the penalty to be imposed, and the defendant's reasons for pleading guilty. *Blankenship*, 858 S.W.2d at 904.

Based on a careful review of the record which includes a transcript of Petitioner's plea submission hearing, we do not find that the evidence preponderates against the post-conviction court's finding that Petitioner's plea was voluntarily and knowingly entered. Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE